JUN 24 1974

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1925

DELPHI COMMUNITY SCHOOL BUILDING CORPORATION,

Petitioner,

vs.

NORTHEASTERN INSURANCE COMPANY OF HARTFORD, NATIONWIDE MUTUAL INSURANCE COMPANY, AND ALLSTATE INSURANCE COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

ALAN H. LOBLEY
D. ROBERT WEBSTER
CHARLES J. TODD
111 Monument Circle, 10th Floor
Indianapolis, Indiana 46204
Counsel for Petitioner

Of Counsel:

ICE MILLER DONADIO & RYAN
111 Monument Circle, 10th Floor
Indianapolis, Indiana 46204

IVES & IVES
113 West Franklin Street
Delphi, Indiana 46923

LEWIS N. MULLIN
Market & Monroe Streets
Delphi, Indiana 46923

Gunthorp-Warren Printing Company, Chicago • 346-1717

INDEX

	PAGE
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutory provisions involved	3
Statement of the case	5
Reasons for granting the writ	8
I. A writ of certiorari should issue to remand this action to the Court of Appeals for its reconsideration in light of the recent decision in *Lehman Bros.* v. *Schein*	8
II. The failure of the Court of Appeals to certify original questions regarding the interpretation of an Indiana statute to the Supreme Court of Indiana constitutes an abuse of discretion requiring the supervisory powers of this Court	11
III. The decision of the Court of Appeals in failing to apply Rule 19 conflicts with the decision of this Court in *Provident Tradesmens Bank & Tr. Co.* v. *Patterson*	14
Conclusion	17
Appendix (Opinion and Judgment of Courts below)	A1

CITATIONS

Cases

Clay v. Sun Ins. Office, 363 U. S. 207, 80 S. Ct. 1222, 4 L. Ed. 2d 1170 (1960) 9

England v. Louisiana Medical Examiners, 375 U. S. 411, 84 S. Ct. 461, 11 L. Ed. 2d 440 (1964) 9

Lehman Bros. v. Schein, ... U. S. ....., 40 L. Ed. 2d 215, 94 S. Ct. ..... (1974) 2, 8, 9, 11, 12

Provident Tradesmens Bank & Tr. Co. v. Patterson, 390 U. S. 102, 88 S. Ct. 733, 19 L. Ed. 2d 936 (1968) 2, 6, 14, 15, 16

Trail Builders Supply Co. v. Reagan, 409 F. 2d 1059 (5th Cir. 1969) 9

Travelers Indemnity Co. v. Westinghouse Elec. Corp., 429 F. 2d 77 (5th Cir. 1970) 16

Virginia Electric & Power Co. v. Westinghouse Elec. Corp., 485 F. 2d 78 (4th Cir. 1973) 16

Wright v. First National Bank of Altus, Oklahoma, 483 F. 2d 73 (10th Cir. 1973) 16, 17

Statutes

Fla. Stat. Ann. § 25.031 9

I. C. 1971, § 27-1-13-6 ..... 3, 5

I. C. 1971, § 33-2-4-1 9

Miscellaneous

Fla. App. R. 4.61 9

Ind. App. R. 15(N) 3, 6, 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No.

DELPHI COMMUNITY SCHOOL BUILDING CORPORATION,

Petitioner,

vs.

NORTHEASTERN INSURANCE COMPANY OF HARTFORD, NATIONWIDE MUTUAL INSURANCE COMPANY, AND ALLSTATE INSURANCE COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioner, Delphi Community School Building Corporation, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on February 21, 1974.

OPINIONS BELOW

The opinions of the United States Court of Appeals for the Seventh Circuit and of the United States District Court for the Northern District of Indiana are unreported and appear in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on February 21, 1974. A timely petition for rehearing and suggestion for rehearing *en banc* was denied on March 25, 1974, and this petition for a writ of certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked pursuant to 28 United States Code § 1254(1).

QUESTIONS PRESENTED

1. Whether the failure of the United States Court of Appeals for the Seventh Circuit to certify questions to the Supreme Court of Indiana that involve an original interpretation of an Indiana statute should cause this action to be remanded to that court for further consideration in view of the recent opinion of this Court in *Lehman Brothers* v. *Schein*, ... U. S. ....., 40 L. Ed. 2d 215, 94 S. Ct. ..... (1974).

2. Whether the United States Court of Appeals for the Seventh Circuit abused its discretion in failing to certify questions of first impression concerning the interpretation of an Indiana statute for which there are no Indiana decisions to the Supreme Court of Indiana for its declaration of the public policy of Indiana regarding the rights of the petitioner, an Indiana citizen.

3. Whether the decision of the United States Court of Appeals for the Seventh Circuit is in conflict with the decision of this Court rendered in *Provident Tradesmens Bank & Tr. Co.* v. *Patterson*, 390 U. S. 102, 88 S. Ct. 733, 19 L. Ed. 2d 936 (1968) by refusing to apply Rule 19 of the Federal Rules of Civil Procedure to the question as to whether the liquidator of an insolvent surety must be joined in an action against that surety's reinsurers brought pursuant to an Indiana statute granting a direct cause of action against insurers and their reinsurers.

STATUTORY PROVISIONS INVOLVED

INDIANA APPELLATE RULE 15(N):

> "When it shall appear to the Supreme Court of the United States, to any circuit court of appeals of the United States, or to the court of appeals of the District of Columbia, that there are involved in any proceeding before it questions or propositions of the laws of this state, which are determinative of the said cause, and there are no clear controlling precedents in the decisions of the Supreme Court of this state, such federal Appellate Court may certify such questions or propositions of the laws of this state to the Supreme Court of this state for instructions concerning such questions or propositions of state law which certificate the Supreme Court of this state, by written opinion, may answer."

I. C. 1971, § 27-1-13-6:

> "Limitation of risks.—No company organized to make any kind or kinds of insurance included in class II and class III of Section fifty-nine [§ 39-3501] shall take, on any one [1] risk of whatever nature, a sum exceeding one-tenth (1/10) part of its paid-up capital, surplus, and contingent reserves, if any, if a stock company or one-tenth (1/10) part of its surplus and contingent reserves, if any, other than a stock company. No portion of any such risk or hazard which shall have been reinsured in a corporation authorized to do insurance business in this state shall be included in determining the limitation of risk prescribed in this section: Provided, That this section shall not apply to marine insurances, or to companies organized to make life insurance.
>
> *No stock or mutual insurance company transacting fidelity or surety business in this state shall expose itself to any loss on any one [1] fidelity or surety risk or hazard in an amount exceeding ten per cent [10%] of its capital, surplus and contingent reserves, if any, unless it shall be protected in excess of that amount by: (a) Reinsurance in a company authorized to transact the fidelity or surety business in this state, provided that such reinsurance is*

in such form as to enable the obligee or beneficiary to maintain an action thereon against the company reinsured jointly with such reinsurer and, upon recovering judgment against such reinsured, to have recovery against such reinsurer for payment to the extent in which it may be liable under such reinsurance and in discharge thereof; or (b) the cosuretyship of such a company similarly authorized; or (c) by deposit with it in pledge or conveyance to it in trust for its protection of property; or (d) by conveyance or mortgage for its protection; or (e) in case a suretyship obligation was made on behalf or on account of a fiduciary holding property in a trust capacity, by deposit or other disposition of a portion of the property so held in trust that no future sale, mortgage, pledge or other disposition can be made thereof without the consent of such company; except by decree or order of a court of competent jurisdiction: Provided: (1) That such a company may execute what are known as transportation or warehousing bonds for United States internal revenue taxes to an amount equal to fifty per cent [50%] of its capital, surplus and contingent reserves, if any; (2) that, when the penalty of the suretyship obligation exceeds the amount of a judgment described therein as appealed from and thereby secured, or exceeds the amount of the subject-matter in controversy or of the estate in the hands of the fiduciary for the performance of whose duties it is conditioned, the bond may be executed if the actual amount of the judgment or the subject matter in controversy or estate not subject to supervision or control of the surety is not in excess of such limitation; and (3) that, when the penalty of the suretyship obligation executed for the performance of a contract exceeds the contract price, the latter shall be taken as the basis for estimating the limit of risk within the meaning of this section. No such company shall, anything to the contrary in this section notwithstanding, execute suretyship obligation guaranteeing the deposits of any single financial institution in an aggregate amount in excess of ten per cent [10%] of the capital, surplus and contingent reserves, if any, of such corporate surety, unless it shall be protected in excess of that amount by credits in accordance with subdivisions (a), (b), (c) or (d) of this paragraph."

STATEMENT OF THE CASE

Delphi Community School Building Corporation (herein "Delphi") is an Indiana public school building corporation that had contracted for the construction of a high school. Pursuant to its contract, the contractor provided its performance and payment bond with an insurance company as surety in the sum of $344,888.00. After partial performance, the contractor defaulted, and Delphi expended $176,146.70 to complete the unperformed work. Pursuant to an Indiana Statute, I. C. 1971, § 27-1-13-6 (Burns § 39-4307) (herein "§ 4307"), the surety was required to reinsure its risk upon Delphi's construction contract. This risk was reinsured pursuant to agreements with Respondents, Northeastern Insurance Company of Hartford, Nationwide Mutual Insurance Company, and Allstate Insurance Company (herein "Reinsurers"). Although not set out in the complaint, the Reinsurers admitted at oral argument below that pursuant to these agreements, the Reinsurers assumed 85% of the risk. After the default of the contractor, the surety became insolvent and entered into liquidation proceedings in the Circuit Court of Sangamon County, Illinois. The Illinois court issued an injunction restraining all persons with claims against the surety from asserting any claim against the liquidator except in the Illinois liquidation proceedings.

Delphi commenced this action in the United States District Court for the Northern District of Indiana pursuant to the Indiana statute, § 4307, that provided the reinsurance agreements must provide the obligee on the bond the right to join and recover from reinsurers in an action on the bond. The jurisdiction of the District Court arose from the diverse citizenships between Delphi and the Reinsurers and the amount in controversy under 28 U. S. C. § 1332 (1964). Without joining the Liquidator of the surety in the action, Delphi sought to recover the reinsurance proceeds due it pursuant to the Indiana Statute and the following provision within the "General Reinsurance Agreement" of the Reinsurers:

> "14. Statutory Provisions: This agreement shall be deemed to comply with *any law* whenever applicable, *which provides that the obligee or other beneficiary of the Bond shall have the right to maintain an action on such an agreement against the Reinsurer.*" (Emphasis added.)

In an unreported opinion, the District Court held that the liquidator of the surety was an indispensable party and could not be joined because of the injunction issued by the Illinois Court and dismissed the action. In its opinion, the District Court neither cited *Provident Tradesmens Bank & Tr. Co.* v. *Patterson*, 390 U. S. 102, 88 S. Ct. 733, 19 L. Ed. 2d 936 (1968), nor considered any of the factors identified by the Supreme Court in *Provident*, that must be considered in determining if an absent party is "indispensable" and if the action should be dismissed.

Upon appeal to the United States Court of Appeals for the Seventh Circuit, the initial panel held that the Indiana Statute, § 4307, did not grant a direct cause of action against Reinsurers to the obligees or beneficiaries of the reinsurance for the purpose of allowing them to recover the reinsurance proceeds in lieu of the liquidator of the insolvent surety, which liquidator would treat such proceeds as part of the general assets of the insolvent estate. Although Delphi initially requested in its appeal, and again on its petition for rehearing, that the interpretation of § 4307 be certified to the Supreme Court of Indiana pursuant to Indiana Appellate Rule 15(N), both requests were denied *sub silento*. Even though it found no Indiana decision that interpreted § 4307, the Court of Appeals declared that the Indiana statute required the joinder of the liquidator of the surety, which was prohibited by the injunction issued by the Illinois Circuit Court. The Court of Appeals affirmed the District Court's dismissal of the action without reference to Fed. R. Civ. P. 19 or *Provident*, *supra*. No attempt was made by either the District Court or the Court of Appeals to consider the factors identified in *Provident*, *supra*, in determining whether

the action could proceed without the liquidator or should be dismissed.

In the appeal to the Court of Appeals, two other actions were consolidated for hearing and decision: *Cummings Wholesale Electric Co., Inc.* v. *Home Owners Insurance Company, et al.*, Cause No. 73-1049; and *James Baylor* v. *Otto Electric Company, Inc., et al.*, Cause Nos. 73-1061 and 73-1062. In addition, there are at least five cases pending in the United States District Court for the Southern District of Indiana which involve the same Indiana Statute and Illinois injunction that is involved in the instant case. These actions are listed below:

> *Oak Hill United School Corporaton, et al.*, v. *Home Owners Insurance Company* v. *Northeastern Insurance Company of Hartford, et al.*, Cause No. IP-72-C-24 (S. D. Ind.).
>
> *Westinghouse Electric Supply Company, A Division of Westinghouse Electric Corporation* v. *Otto Electric Company, Inc., et al.*, Cause No. IP 70-C-261 (S. D. Ind.).
>
> *Home Owners Insurance Company* v. *Otto Electric Company, Inc., et al.*, Cause No. IP 70-C-218 (S. D. Ind.).
>
> *Home Owners Insurance Company* v. *Otto Electric Company, Inc., et al.*, Cause No. IP 70-C-202 (S. D. Ind.).
>
> *Home Owners Insurance Company* v. *Otto Electric Company, Inc., et al.*, Cause No. IP 70-C-194 (S. D. Ind.).

The above listed actions involve at least four different Indiana public school building corporations and at least five different Indiana communities that had public schools under construction.

REASONS FOR GRANTING THE WRIT

I. A Writ of Certiorari Should Issue to Remand This Action to the Court of Appeals for Its Reconsideration in Light of the Recent Decision in Lehman Bros. v. Schein.

In a decision rendered after the Petition For Rehearing had been denied in the instant case, the Supreme Court of the United States expressed for the first time its view on the use of certification procedures by federal courts. *See Lehman Bros.* v. *Schein,* ..... U. S. ....., 40 L. Ed. 2d 215, 94 S. Ct. ..... (1974). Without the benefit of controlling and decisive Florida Court decisions, the Second Circuit determined the law of Florida in relation to the liability of a fiduciary for securities transactions involving inside information. Although the Petitioner had not requested the certification of the issue of Florida law until its petition for rehearing, the Supreme Court vacated the Court of Appeals judgment and remanded for reconsideration whether the controlling issue of Florida law should be certified to the Florida Supreme Court pursuant to Rule 4.61 of the Florida Appellate Rules. *Lehman Bros.* v. *Schein, supra,* 40 L. Ed. 2d, at 221.

In a concurring opinion in *Lehman, supra,* Justice Rehnquist expressed the utility of using certification procedures:

> "State certification procedures are a very desirable means by which a federal court may ascertain an undecided point of state law, especially where, as is the case in Florida, the question can be certified directly to the court of last resort within the State." *Lehman Bros.* v. *Schein, supra,* 40 L. Ed. 2d, at 222 (Rehnquist, J., concurring opinion).

This same sentiment was expressed by Justice Douglas, prior to his writing the opinion of the Court in *Lehman, supra:*

> "Another alternative is for the District Court to follow the certificate route, when one is available. The Florida Supreme Court is authorized by Rule for answering cer-

> tificates concerning state law questions tendered by the federal courts. We used that procedure on Florida State Law perplexities (*Dresner* v. *Tallahassee*, 375 U. S. 136, 84 S. Ct. 235, 11 L. Ed. 2d 208; *Aldrich* v. *Aldrich*, 375 U. S. 75, 249, 84 S. Ct. 184, 305, 11 L. Ed. 2d 141, 304). We can not require the States to provide such a procedure; but by asserting the independence of the federal courts and insisting on prompt adjudications we will encourage its use." (Footnotes omitted). *England* v. *Louisiana Medical Examiners*, 375 U. S. 411, 84 S. Ct. 461, 11 L. Ed. 2d 440 (1964); *accord*, *Trail Builders Supply Co.* v. *Reagan*, 409 F. 2d 1059 (5th Cir. 1969). *See also*, *Clay* v. *Sun Ins. Office*, 363 U. S. 207, 80 S. Ct. 1222, 4 L. Ed. 2d 1170 (1960).

Indiana has almost the identical certification statute and Appellate Court Rule as has been enacted in Florida. *Compare* Fla. Stat. Ann. § 25.031 *and* Fla. App. R. 4.61 *with* I. C. 1971, § 33-2-4-1 *and* Ind. App. R. 15(N). Both Florida and Indiana permit certification of questions by the United States Supreme Court or any court of appeals directly to the Supreme Court of their respective states. Therefore, the identical benefits are derived from the Indiana procedure as are derived from the Florida procedure.

Unlike the Petitioner in *Lehman*, *supra*, Delphi requested the certification of questions of Indiana law upon its appeal to the Court of Appeals as well as within its petition for rehearing. However, the Court of Appeals for the Seventh Circuit refused to even consider the requests.

Certification of the controlling issue of Indiana law to the Supreme Court of Indiana is particularly appropriate in the instant case. The entire decision by the Court of Appeals concerned an interpretation of an Indiana statute that has never been considered by an Indiana appellate court. The Seventh Circuit indicated that it had no precedents from which to seek an interpretation of that part of the statute directly involved. The Court of Appeals stated in its opinion:

> "This statute was apparently modeled on a comparable New York Statute (Laws of 1920, ch. 563, § 3 now as amended McKinney's Consol. Laws, ch. 28, §§ 47, 315). However, we have found no cases where legislative history under either statute to illuminate the meaning of the critical, italicized proviso." Appendix, at A6.

The Court of Appeals then adopted an interpretation which precluded Indiana's obligees on surety bonds from ever maintaining an action under the Indiana statute when the original surety is insolvent even though the provision providing for direct action against reinsurers can only exist for protecting obligees from surety's in financial difficulties.

Having no clear, controlling precedent from the Indiana Supreme Court, the instant case was a paradigm for certification. In addition to the instant case, eight other actions are pending in Indiana federal courts involving the precise issue of law and the identical Indiana statute. The decision involved the resolution of what is on its face an apparent conflict between the public policies of the State of Indiana and the State of Illinois, two states within the circuit. The ramifications of the Court of Appeals' decision is far-reaching. The decision not only conclusively decides pending actions, but will stand as the *sole* authority for the interpretation of an important state statute regarding insurance law. The rights of several individuals will be summarily decided on the basis of the Court of Appeals' decision before the Supreme Court of Indiana will have another opportunity to consider the public policy of Indiana in the construction of the Indiana Statute.

Since the Seventh Circuit did not have the benefit of this Court's opinion in *Lehman Bros.* v. *Schein, supra,* at the time it decided Delphi's appeal and denied its petition for rehearing, this Court should grant a writ of certiorari, vacate the Court of Appeals judgment, and remand the action for further consideration of the certification issue. In the alternative, this Court should grant a writ of certiorari, retain jurisdiction to consider

the other important issues presented by this Petition, and certify only those questions of Indiana law to the Supreme Court of Indiana for decision.

II. The Failure of the Court of Appeals to Certify Original Questions Regarding the Interpretation of an Indiana Statute to the Supreme Court of Indiana Constitutes an Abuse of Discretion Requiring the Exercise of the Supervisory Powers of This Court.

The Supreme Court of the United States has the inherent authority to supervise and correct abuses by federal courts in their exercise of discretionary powers. This authority was expressly noted in a concurring opinion by Justice Rehnquist in a recent opinion by this Court in which a judgment of the Second Circuit was vacated and remanded to reconsider the desirability of certifying novel questions of Florida law to the Florida Supreme Court:

> "The authority which Congress has granted this Court to review judgments of the courts of appeals undoubtedly vests us not only with the authority to correct errors of substantive law, but to prescribe the method by which those courts go about deciding the cases before them. *Western Pacific R. Corp.* v. *Western Pacific R. Co.*, 345 U. S. 247 (1953). But a sensible respect for the experience and competence of the various integral parts of the federal judicial system suggests that we go slowly in telling the courts of appeals or the district courts how to go about deciding cases where federal jurisdiction is based on diversity of citizenship, cases which they see and decide far more often than we do." *Lehman Bros.* v. *Schein*, ... U. S. ....., 40 L. Ed. 2d 215, 221, 94 S. Ct. ..... (1974).

Although Justice Rehnquist advises the Court to "go slowly" in advising federal courts how to decide diversity actions, the instant case provides a clear example of an abuse of discretionary powers by the Court of Appeals and should be vacated by the Supreme Court. The Court of Appeals was faced with

the necessity of determining the meaning of a specific phrase within an Indiana statute. No Indiana Appellate Court had even considered the statute. Although the statute may have been modeled after a similar New York statute, no New York court had considered the New York statute. There was no legislative history available to the Court of Appeals in relation to either state statute. In addition to having two separate actions and one consolidated action before the Court of Appeals, five other actions were pending in federal courts that involved the identical state statute and issues of Indiana law. Although Delphi requested the Court of Appeals on appeal and as a basis for rehearing to utilize the certification procedures available under the Indiana Appellate Court Rules, the Court of Appeals refused to even consider such a procedure in rendering its decisions. The abuse of discretion in failing to use the certification procedure is aptly demonstrated by this Court's opinion in *Lehman Bros.* v. *Schein, supra,* wherein Justice Douglas, writing for the Court, states:

> "Here resort to it would seem particularly appropriate in view of the novelty of the question and the great unsettlement of Florida law, Florida being a distant State." *Lehman Bros.* v. *Schein,* ..... U. S. ....., 40 L. Ed. 2d 215, 220, 94 S. Ct. ..... (1974).

Novel and uncertain questions of law are clearly present in the instant case because of the lack of authority to guide the Court of Appeals on the determining issues of state law.

The abuse of discretion is further demonstrated by the exceptionally narrow interpretation given to the Indiana statute by the Court of Appeals in order to resolve the apparent conflict between it and the policy of the State of Illinois. Although indicating that the statute was designed to protect against the insolvency of insurance companies, the Court of Appeals limited that protection to merely guard against insolvency after a judgment has been entered against an insured. The Court of Appeals states:

> "This construction does not leave Section 4307 without a purpose. Taken as a whole, the Section is designed to protect insurance companies against insolvency. It prevents insurance companies from committing more than 10% of their assets to any one risk. Where there is a chance that the insurer will be unable to pay a large claim, the insured has an incentive to join the reinsurer as a defendant in any suit. The direct action proviso thus reduces the chances that the insurer will be forced into insolvency during the interval between the time judgment is rendered against it and the time it can collect from the reinsurer. If the insurer nevertheless becomes insolvent, continued operation of the direct action proviso would lead to a multiplicity of litigation and a preference for large risks. Since multiple litigation would waste the assets of the insolvent estate, and insurers with large risks have more incentive to protect themselves by investigating the financial status of the insurer before accepting it as a surety, we are confident that the legislature did not intend to give them a direct cause of action to secure preferences from the reinsurers." Appendix at A10.

Through this unguided interpretation, the Court of Appeals emasculates the obvious intent of the statute as it applies to Delphi, at least eight other Indiana citizens involved in pending litigation, and all others who assert such claims against reinsurers. In doing so, the Court of Appeals interprets the Indiana statute to accord with the public policy of the State of Illinois, another state within the circuit, rather than in accord with what on its face appears to be the public policy of the State of Indiana. When a Court of Appeals is thus faced with what on their face appears to be conflicts between public policies of states within the circuit, the reasons for certification are overwhelming. Under such facts, the spirit of federalism certainly would require certification. Until the Supreme Court of Indiana can consider the public policy and competing interest of its citizens, many claimants may fail even to assert their claims against reinsurers because of the restrictive interpretation placed upon the statute by the Seventh Circuit.

This Court should exercise its inherent supervisory powers over the courts of appeals and grant a writ of certiorari to vacate the judgment of the Seventh Circuit for abusing its discretion in failing to certify original questions concerning an Indiana statute to the Supreme Court of Indiana for decision.

III. The Decision of the Court of Appeals in Failing to Apply Rule 19 Conflicts with the Decision of This Court in Provident Tradesmens Bank and Trust Co. v. Patterson.

The Court of Appeals and the District Court dismissed Delphi's cause of action for failure to join the liquidator of the insurer on the construction bond. Both courts interpreted the Indiana statute to require such a joinder and found that the injunction issued by the Illinois Circuit Court precluded such joinder.

In a diversity action in federal court, the ability to continue litigation in the absence of a party is determined by Rule 19 of the Federal Rules of Civil Procedure. The Supreme Court of the United States has considered the recently amended Rule 19 in only one decision, *Provident Tradesmens Bank & Tr. Co. v. Patterson*, 390 U. S. 102, 88 S. Ct. 733, 19 L. Ed. 2d 936 (1968). The Provident Tradesmens Bank, as the Administrator of the estate of a passenger that had been killed in an automobile accident, sued the estate of the driver. The owner of the automobile was not joined in the action. The Court of Appeals for the Third Circuit reversed a directed verdict for the bank upon its own motion that the owner of the automobile was an indispensable party to the litigation. Since the owner of the automobile had liability insurance in a fixed amount, the Court of Appeals reasoned that any recovery by the bank against the estate of the driver could deplete the amount of insurance proceeds available in pending litigation against the owner brought by other passengers.

On appeal, this Court reversed the decision of the Third Circuit Court of Appeals. The Court assumed that the owner

of the automobile was within the category of persons who should be "joined if feasible," since he had an interest in preserving the insurance fund for his potential liability in the pending litigation. Examining Rule 19(b), the Supreme Court identified the following factors that *must be considered* by a court in determining if a party is indispensable:

> (1) The interest of the plaintiff in the forum.
>
> (2) The interest of the defendant in avoiding multiple litigation or inconsistent relief, or sole responsibility for a liability he shares with another.
>
> (3) The interest of the outsider whom it would have been desirable to join.
>
> (4) The interest of the courts and the public in complete, consistent, and efficient settlement of controversies.
>
> (5) The interest of the court in being able to shape its relief to accommodate all of the preceding interests. *Provident Tradesmens Bank & Tr. Co.* v. *Patterson*, 390 U. S. 102, 109-11, 19 L. Ed. 2d 936, 945-46 (1968).

After examining each of the factors in relation to the litigation, the Supreme Court unanimously decided to reverse the decision of the Court of Appeals for the Third Circuit and expressly found that the owner of the automobile was *not* an indispensable party within the meaning of Rule 19(b).

Both the Court of Appeals and the District Court committed the same error that was committed by the Third Circuit Court of Appeals in *Provident*. Both courts found the "substantive" rights of the parties to be determined by the Indiana statute. Since the statute purportedly required the joinder of the liquidator, the Court of Appeals affirmed the District Court's dismissal of the action without even considering the factors identified by this Court in *Provident*. The Supreme Court, in *Provident*, expressly rejected this approach to Rule 19 questions:

> "The decision whether to dismiss (i.e., the decision whether the person missing is 'indispensable') must be based on factors varying with the different cases, some such factors being substantive, some procedural, some compelling by

> themselves, and some subject to balancing against opposing interests. Rule 19 does not prevent the assertion of compelling substantive interests; it merely commands the courts to examine each controversy to make certain that the interest really exists. To say that a court 'must' dismiss in the absence of an indispensable party and that it 'cannot proceed' without him puts the matter in the wrong way around: A court does not know whether a particular person is 'indispensable' until it has examined the situation to determine whether it can proceed without him." *Provident Tradesmens Bank & Tr. Co.* v. *Patterson*, 390 U. S. 102, 118, 19 L. Ed. 2d 936, 950 (1968).

Furthermore, the interests of the liquidator in the instant case are identical to the interests of the owner of the automobile in *Provident*. In both cases, the absent party had a claim to insurance proceeds for potential liability arising in relation to pending litigation. In both cases, the joinder of the absent party would require dismissal of the action. In *Provident*, the joinder of the automobile owner would have destroyed the diversity of citizenship, and in the instant case, the joinder of the liquidator purportedly would violate the non-suit injunction issued by the Illinois Circuit Court.

The conflict of the decisions of the District Court and of the Court of Appeals with the decision of this Court in *Provident* was presented in Delphi's brief on the merits and in its petition for rehearing. The Court of Appeals has ignored that conflict and this Court's mandate in *Provident*. Although the Supreme Court did not expressly consider the application of Rule 19 to purported "substantive" rights bestowed by statute, the approach to Rule 19 questions was identified in *Provident*. The Seventh Circuit, in the instant case, and other Courts of Appeals have failed to consider the factors identified in *Provident* in relation to Rule 19 questions. *See Travelers Indemnity Co.* v. *Westinghouse Elec. Corp.*, 429 F. 2d 77 (5th Cir. 1970). *But See Virginia Electric & Power Co.* v. *Westinghouse Elec. Corp.*, 485 F. 2d 78 (4th Cir. 1973); *Wright* v. *First National Bank*

of Altus, Oklahoma, 483 F. 2d 73 (10th Cir. 1973). This conflict in principal between the circuits, and the direct conflict with the *Provident* decision in the instant case, demonstrate that a writ of certiorari should issue by this court. The Supreme Court should correct the conflict between its earlier decision in *Provident* and the judgment of the Court of Appeals in the instant case by reversing the judgment of the Court of Appeals. The writ should issue for the further reason of specifically clarifying the application of Rule 19 to "substantive" rights purportedly created by statute.

CONCLUSION

This Court should issue a writ of certiorari for the review of the decision of the Court of Appeals for the Seventh Circuit. The instant case involves an original interpretation of an Indiana statute that appears to conflict with the public policy of the State of Illinois. No Indiana court decision nor any legislative history was available to the Court of Appeals to assist it in interpreting the Indiana statute. Although the Indiana statute was the subject of multiple suits pending in federal courts in Indiana, the Court of Appeals refused the repeated requests of the petitioner to certify the questions of first impression of Indiana law to the Supreme Court of Indiana. This Court's decision in *Lehman Bros.* v. *Schein, supra*, in which the Supreme Court considered state certification statutes for the first time, was not rendered until after the petition for rehearing was denied. For these reasons, the Supreme Court should issue a writ of certiorari and remand this action for further consideration by the Court of Appeals in view of its recent decision in *Lehman Bros.*

In the alternative, this Court should issue its writ of certiorari, retain jurisdiction over the cause, and certify the original questions of Indiana law to the Supreme Court of Indiana. The failure to certify such questions by the Court of Appeals in the face

of conflicting public policies between states and total lack of precedent from which to render an opinion constituted an obvious abuse of discretion that should be corrected through the supervisory powers of this Court. In this manner, the Court could also consider the other important issues presented within the instant case.

A writ of certiorari should issue to the Court of Appeals for the further reason of resolving the conflict between the decision below and *Provident Tradesmens Bank & Tr. Co.* v. *Patterson, supra.* The Court of Appeals wholly failed to follow the mandate of this Court in *Provident* that consideration must be given to specific factors pursuant to Fed. R. Civ. P. 19 before rendering a decision to dismiss an action for the failure to join an absent party. The identical error made by the Third Circuit in *Provident* was made by the Seventh Circuit in the instant case. Both courts held that "substantive law" required the joinder of an absent party and dismissed the actions without further consideration to Rule 19. Although the application of Rule 19 is clear in the instant case, this Court should grant a writ of certiorari to completely resolve the question of the applicability of Rule 19 to "substantive" rights purportedly created by statute.

For these reasons a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,

ALAN H. LOBLEY
D. ROBERT WEBSTER
CHARLES J. TODD
111 Monument Circle, 10th Floor
Indianapolis, Indiana 46204
Counsel for Petitioner

APPENDIX.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

March 25, 1974.

Before

HON. WALTER J. CUMMINGS, *Circuit Judge*
HON. JOHN PAUL STEVENS, *Circuit Judge*
HON. ROBERT A. GRANT, *Senior District Judge**

DELPHI COMMUNITY SCHOOL BUILDING CORP.,
Plaintiff-Appellant.

No. 73-1070 *vs.*

NORTHEASTERN INSURANCE COMPANY OF HARTFORD, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

No. 72 L 2

JESSE E. ESCHBACH, *Judge.*

ORDER

On consideration of the petition of the appellant, Delphi Community School Building Corporation, for a rehearing by the Court in the above-entitled appeal, and no member of the panel and no judge in regular active service having requested that a vote be taken on the suggestion for an *en banc* rehearing, and the panel having voted to deny a rehearing,

It Is Ordered that the petition of the appellant for a rehearing in the above-entitled appeal be, and the same is hereby denied.

* Senior District Judge Robert A. Grant of the Northern District of Indiana is sitting by designation.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit

September Term, 1973 — January Session, 1974

No. 73-1049

CUMMINGS WHOLESALE ELECTRIC CO., INC.,
Plaintiff-Appellant,

vs.

HOME OWNERS INSURANCE COMPANY, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

No. IP 70 C 669

JAMES E. NOLAND
Judge.

Nos. 73-1061, 73-1062

JAMES BAYLOR,
Plaintiff and Counter-Defendant-Appellee,

vs.

OTTO ELECTRIC COMPANY, INC., et al.,
Defendants.

Appeals from the United States District Court for the Southern District of Indiana, Indianapolis Division.

Nos. IP 70 C 195
IP 70 C 201

WILLIAM E. STECKLER, *Judge.*

No. 73-1070

DELPHI COMMUNITY SCHOOL BUILDING CORP.,
Plaintiff-Appellant,

vs.

NORTHEASTERN INSURANCE COMPANY OF HARTFORD, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

No. 72 L 2

JESSE E. ESCHBACH, *Judge.*

Heard January 9, 1974—Decided February 21, 1974

Before CUMMINGS, and STEVENS, *Circuit Judges,* and GRANT, *Senior District Judge.**

CUMMINGS, *Circuit Judge.* These appeals involve common issues concerning plaintiffs' rights against the reinsurers of the insolvent Home Owners Insurance Company, which had issued certain surety bonds in Indiana.

In No. 73-1049, plaintiff Cummings Electric furnished more than $120,000 worth of materials to Otto Electric Company, which became insolvent. Home Owners had written surety bonds for Otto Electric. Home Owners in turn had reinsurance agreements with the three defendant reinsurers. Home Owners also became insolvent and was undergoing liquidation in Illinois. Plaintiff obtained a default judgment against Home Owners on August 27, 1971. Through negotiations with its liquidator, the default judgment was vacated and a consent decree filed *nunc pro tunc* as of April 14, 1972, against the liquidator. Plaintiff filed an amended complaint on April 17, 1972, to join the defendant reinsurers who had been ceded portions of Home Owners' risks on the surety bonds. Judge Noland granted the reinsurers' and liquidator's motions to dismiss the amended complaint without prejudice in an order not containing any reasons for the dismissal.

In Nos. 73-1061 and 1062, two Indiana public school building corporations filed counterclaims against Home Owners. They were obligees on 1969 performance bonds securing the completion of electrical work to be done by Otto Electric on two new public high school buildings in Indiana. These counterclaims sought the recovery of all costs and expenses incurred by the schools in completing the electrical work for their high school buildings following the default of Otto Electric. On December 17, 1971, the defendant school building corporations filed their amended supplemental counterclaim seeking judgment against the three reinsurance companies and the

* Senior District Judge Robert A. Grant of the Northern District of Indiana is sitting by designation.

liquidator of Home Owners. In his two orders dismissing the counterclaimants' actions without prejudice, Judge Steckler explained:

> "This dismissal does not operate as an adjudication upon the merits, and Counter-Claimants and Third-Party Plaintiffs are free to pursue their claim in the proper forum, *i.e.*, the Illinois liquidation proceedings of Home Owners Insurance Company [brought in the Circuit Court of Sangamon County, Illinois]."[1]

In No. 73-1070, another Indiana public school building corporation entered into a contract with Otto Electric Company for work to be performed in constructing Delphi Community High School. Otto Electric entered into a performance bond and labor and materials bond with Home Owners as surety for $344,888. After partial performance Otto Electric defaulted and plaintiff expended $176,146.70 to complete the unperformed work. Plaintiff sued the reinsurers without joining the liquidator of Home Owners. In an unreported opinion granting the reinsurers' motion to dismiss, Judge Eschbach held that the liquidator of Home Owners was an indispensable party and could not be joined because of the April 8, 1971, injunction of the Circuit Court of Sangamon County, Illinois, restraining all persons with claims against Home Owners from asserting any claim against the liquidator except in the Illinois liquidation proceedings. As in Nos. 73-1061 and 1062, the court stated that plaintiff was free to pursue its claim in the Illinois liquidation proceedings of Home Owners.

These various appeals involve the proper construction to be given to Ind. Code 1971, § 27-1-13-6 (Burns § 39-4307), which was enacted as Section 175 of the 1935 Indiana Insurance Law and provides as follows:

> "Limitation of risks.—No company organized to make any kind or kinds of insurance included in class II and

1. Judge Dillin dismissed similar counterclaims of two other Indiana public school building corporations on comity grounds in Nos. IP 70-C-202 and 218 (S. D. Ind. October 30 and 31, 1973).

class III of section fifty-nine [§ 39-3501] shall take, on any one [1] risk of whatever nature, a sum exceeding one-tenth [1/10] part of its paid-up capital, surplus, and contingent reserves, if any, if a stock company or one-tenth [1/10] part of its surplus and contingent reserves, if any, if other than a stock company. No portion of any such risk or hazard which shall have been reinsured in a corporation authorized to do insurance business in this state shall be included in determining the limitation of risk prescribed in this section: Provided, That this section shall not apply to marine insurances, or to companies organized to make life insurance.

"No stock or mutual insurance company transacting fidelity or surety business in this state shall expose itself to any loss on any one [1] fidelity or surety risk or hazard in an amount exceeding ten per cent [10%] of its capital, surplus and contingent reserves, if any, unless it shall be protected in excess of that amount by: (a) Reinsurance in a company authorized to transact the fidelity or surety business in this state, *provided that such reinsurance is in such form as to enable the obligee or beneficiary to maintain an action thereon against the company reinsured jointly with such reinsurer and, upon recovering judgment against such reinsured, to have recovery against such reinsurer for payment to the extent in which it may be liable under such reinsurance and in discharge thereof;* or (b) the cosuretyship of such a company similarly authorized; or (c) by deposit with it in pledge or conveyance to it in trust for its protection of property; or (d) by conveyance or mortgage for its protection; or (e) in case a suretyship obligation was made on behalf or on account of a fiduciary holding property in a trust capacity, by deposit or other dispositon of a portion of the property so held in trust that no future sale, mortgage, pledge or other disposition can be made thereof without the consent of such company; except by decree or order of a court of competent jurisdiction: Provided: (1) That such a company may execute what are known as transportation or warehousing bonds for United States internal revenue taxes to an amount equal to fifty per cent [50%] of its capital, surplus and contingent reserves, if any; (2) that,

when the penalty of the suretyship obligation exceeds the amount of a judgment described therein as appealed from and thereby secured, or exceeds the amount of the subject-matter in controversy or of the estate in the hands of the fiduciary for the performance of whose duties it is conditioned, the bond may be executed if the actual amount of the judgment or the subject-matter in controversy or estate not subject to supervision or control of the surety is not in excess of such limitation; and (3) that, when the penalty of the suretyship obligation executed for the performance of a contract exceeds the contract price, the latter shall be taken as the basis for estimating the limit of risk within the meaning of this section. No such company shall, anything to the contrary in this section notwithstanding, execute suretyship obligations guaranteeing the deposits of any single financial institution in an aggregate amount in excess of ten per cent [10%] of the capital, surplus and contingent reserves, if any, of such corporate surety, unless it shall be protected in excess of that amount by credits in accordance with subdivisions (a), (b), (c) or (d) of this paragraph." (Italics supplied.)

This statute was apparently modeled on a comparable New York statute (Laws of 1920, ch. 563, § 3, now as amended McKinney's Consol. Laws, ch. 28, §§ 47, 315). However, we have found no cases or legislative history under either statute to illuminate the meaning of the critical, italicized proviso.

The Indiana legislature required that these reinsurance policies be "in such form" as to permit the obligee or beneficiary to sue the reinsured and reinsurer jointly. Paragraph 14 of the General Reinsurance Agreement sufficiently satisfies this requirement.[2] Because of the mandate of Section 4307, we

2. Paragraph 14 provides in part:

"This Agreement shall be deemed to comply with any law, whenever applicable, which provides that the Obligee or other beneficiary of the Bond shall have the right to maintain an action on such an agreement against the Reinsurer."

reject the reinsurers' argument that Paragraph 14 is inconsistent with Article XIV of the Separate Reinsurance Agreements[3] and hence was not incorporated therein by Article XI thereof.[4] This does not require a strained construction of Article XIV, since it only relates to payments during insolvency, and as will be seen, Section 4307 grants no preference and authorizes no direct action after liquidation proceedings begin. Because no part of any of the agreements other than Paragraph 14 of the General Agreement gives the insured any rights against the reinsurers, we hold that these agreements provide such rights only to the extent necessary to comply minimally with Section 4307.

The various insured claimants in these cases were given a direct right of action against the reinsurers by virtue of Section 4307 and Paragraph 14 of the General Reinsurance Agreement. While each case presents different procedural problems relating to whether or not the insurer and reinsurers were sued "jointly," we conclude that at least in Nos. 73-1061 and 1062 the procedural requirements of Section 4307 were satisfied. It therefore becomes necessary to decide whether the right to sue the reinsurers directly survived the insolvency of Home Owners and gave claimants a preference in the reinsurance proceeds over the general creditors.

Under common law principles followed in Indiana, obligees such as these claimants have no rights to reinsurance proceeds

3. Article XIV of each Separate Reinsurance Agreement (with an immaterial variation) provides in part:

> "In the event of the insolvency of the Company, the Reinsurance under this Agreement shall be payable by the Reinsurer to the Company, or to its liquidator, receiver or statutory successor * * *."

4. Article XI of each Separate Reinsurance Agreement provides:

> "All reinsurance effected in accordance with the provisions of this Agreement shall be subject to the terms and conditions of the General Reinsurance Agreement (revised February 1, 1950, and as amended from time to time) of the Surety Association of America, except to the extent that said Agreement is inconsistent with the provisions hereof."

unless the insurance agreements so provide. Therefore, upon the insolvency of the insurer, the proceeds of the reinsurance are assets to be distributed among the general creditors of the insured. *Florida* ex rel. *O'Malley* v. *Department of Insurance*, ... Ind. App. ....., 291 N. E. 2d 907, 913 (1973); *United States* v. *Federal Surety Co.*, 73 F. 2d 964, 967 (4th Cir. 1934), certiorari denied, 294 U. S. 711. We turn to Section 4307 to see if the contractual incorporation of that statute changes the common law result.

While we agree with claimants that Section 4307 accorded them a direct right of action against the insurer jointly with the reinsurers, we do not agree that the Indiana Legislature intended to give them a preference over the general creditors of an insolvent reinsured. When the General Assembly enacted the 1935 Indiana Insurance Law, it disfavored granting preferences in assets of insolvent insurance companies. Thus Section 37(b) of the 1935 law, now Ind. Code § 27-1-4-9 (Burns § 39-3409 (b)), provides that an Indiana liquidation court may issue any orders necessary to prevent the obtaining of any preferences against any part of the assets of an insolvent insurance company. Similarly, Section 38, now Ind. Code § 27-1-4-10 (Burns § 39-3410), provides that if an insurance company is in liquidation in Indiana, no suit can be maintained against the company outside the liquidation proceedings. Since Section 4307 specifies that the reinsurer be sued jointly with the insurer, Section 3410 would prevent any suit under an agreement minimally complying with Section 4307, once Indiana liquidation proceedings had begun.[5] We do not believe a different result was intended when the liquidation proceeding takes place outside Indiana.

When the legislature intended to grant a preference, it did so explicitly, as in Section 43 of the 1935 Act, now Ind. Code

5. In the parallel New York statute, this result was avoided by Laws of 1939, ch. 882, § 315, which, *inter alia*, added the language italicized below. McKinney's Consol. Law, ch. 28, § 315(1)(a) provides:

> "1. In applying the limitation of section forty-seven to fidelity and surety risks, the net amount of exposure on any one fidelity or surety risk shall, except as provided in subsection

§ 27-1-4-15 (Burns § 39-3415), which provides that certain wage claims "shall be paid prior to the payment of every other debt or claim * * *." We conclude that if the Indiana Insurance Law were intended to give claimants a preference in the assets of an insolvent insurance company, the statutory expression would have been equally explicit. Our determination that there is no preference leads to the conclusion that the direct cause of action does not survive the commencement of liquidation proceedings. It would obviously be impossible for the district courts in these cases to determine the share to which each claimant would be entitled if it participated on a non-preferential basis in the Illinois liquidation proceeding. Conversely, since claimants are not entitled to a preference, they will not be prejudiced if the Illinois court refuses to apply Indiana law.

In arguing for preferences, counterclaimants in Nos. 73-1061 and 1062 have relied on *First National Bank of Kansas City* v. *Higgins*, 357 S. W. 2d 139 (Mo. 1962). However, the Supreme Court of Missouri recognized the general rule that "the liability of the insuring company is solely to the reinsured company, or to its receiver, in the event of its insolvency." 357 S. W. 2d at 143. The court held that although the reinsured had become insolvent, the reinsurer was directly liable to the injured plaintiff because of a provision in the reinsurance contract that the "liability of [reinsurer] shall follow that of [reinsured] in every case and be subject in all respects to all the general and special stipulations, clauses, waivers and modifications of [reinsured's] policy, binder, or other undertaking and any endorsements

four, be deemed within the limit of ten per cent if such company is protected in excess of that amount by:

"(a) reinsurance, in a company authorized to do such business in this state, which is in such form as to enable the obligee or beneficiary to maintain an action thereon against the ceding insurer jointly with the assuming insurer or, *where the commencement or prosecution of actions against the ceding insurer has been enjoined by any court of competent jurisdiction or any justice of judge thereof, against the assuming insurer alone*, and to have recovery against such assuming insurer for its share of the liability thereunder and in discharge thereof; * * *." (Emphasis supplied.)

thereon * * *." 357 S. W. 2d at 144. This clause was held to incorporate a clause of the reinsured's auto liability policy which provided that a party who had obtained a tort judgment against the insured could sue the insurer directly. In the present case, neither the General nor Separate Reinsurance Agreements contains such an incorporation clause, so that *Higgins* is inapt. For similar reasons, *Federoff* v. *Ewing*, 386 Mich. 474, 192 N. W. 2d 242 (1971), vacating 29 Mich. App. 1, 185 N. W. 2d 79 (1970), is inapplicable.

This construction does not leave Section 4307 without a purpose. Taken as a whole, the Section is designed to protect insurance companies against insolvency. It prevents insurance companies from committing more than 10% of their assets to any one risk. Where there is a chance that the insurer will be unable to pay a large claim, the insured has an incentive to join the reinsurer as a defendant in any suit. The direct action proviso thus reduces the chances that the insurer will be forced into insolvency during the interval between the time judgment is rendered against it and the time it can collect from the reinsurer. If the insurer nevertheless becomes insolvent, continued operation of the direct action proviso would lead to a multiplicity of litigation and a preference for large risks. Since multiple litigation would waste the assets of the insolvent estate, and insureds with large risks have more incentive to protect themselves by investigating the financial status of the insurer before accepting it as surety, we are confident that the legislature did not intend to give them a direct cause of action to secure preferences from the reinsurers.

What we have said applies to all four cases. Because the incorporation of Section 4307 into the reinsurance agreements creates no preference and no cause of action which survived the insolvency of Home Owners, none of the insured can collect on their claims except through the Illinois liquidation proceedings. It is therefore unnecessary to decide the many other issues raised in the briefs.

The four dismissal orders are affirmed.

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Indiana
Hammond Division at Lafayette

DELPHI COMMUNITY SCHOOL BUILDING CORPORATION,
Plaintiff,

vs.

NORTHEASTERN INSURANCE COMPANY OF HARTFORD, NATIONWIDE MUTUAL INSURANCE COMPANY, ALLSTATE INSURANCE COMPANY,
Defendants.

Civil No. 72 L 2

MEMORANDUM OF DECISION AND ORDER

Defendants have moved to dismiss the above-captioned matter for failure to state a claim upon which relief can be granted. This court has concluded that the motion shall be granted but on grounds other than those strictly asserted by the defendants. An essential prerequisite to plaintiff's action against these defendants is the presence of an indispensible party, whose joinder should not be compelled, and therefore plaintiff's cause must be dismissed pursuant to *Fed. R. Civ. P.* 12(b)(6) and 19(b).

Plaintiff has alleged in its complaint that on February 29, 1968 it entered into a contract with Otto Electric Company, Inc., for electrical work to be performed on the Delphi Community High School. On that same date, Otto Electric Company entered into a performance bond and a labor and materials bond with Homeowners Insurance Company, Inc. (hereinafter Homeowners) as Surety. On February 11, 1970 Otto Electric defaulted on its contracts. Homeowners is now in

liquidation pursuant to the laws of the State of Illinois. Pursuant to certain reinsurance treaties, a portion of the risk undertaken by Homeowners on the bonds written for the Otto Electric Company, as was true of most if not all bonds Homeowners would underwrite, was ceded to the defendants herein as reinsurers. Plaintiff in this action seeks to proceed directly against the defendant reinsurers for the obligation on the bond.

Defendants, in their motion, have contended, inter alia, that plaintiff may not proceed against them directly, but that plaintiff may only proceed against them jointly with the reinsured, Homeowners. Defendants further submit that this court should accord full faith and credit to an order of the Sangamon County, Illinois, Circuit Court declaring the reinsurance proceeds an asset of the court—appointed Liquidator of Homeowners and precluding the payment of such assets to any party but the Liquidator. Plaintiff, in opposition to this motion, has argued that because of a provision in the reinsurance agreements coupled with IND. ANN. STAT. § 39-4307 (Burns Repl. 1965), they may proceed directly against these defendants, singly. Plaintiff contends there is no attempt being made here to sue the Illinois statutory liquidator or to interfere in any way with the assets or the orderly administration of Homeowners' estate.

This court must proceed from the proposition that ordinarily reinsurance is one of indemnity only, by the reinsurer (defendants) to the reinsured (Homeowners), and as a general rule the liability of the reinsurer is solely to the reinsured. *See, e.g., Morris and Company* v. *Skandanavia Ins. Co.*, 279 U. S. 405, 408 (1929); *Bruckner-Mitchell* v. *Sun Indemnity Co. of New York*, 82 F. 2d 434, 445 (D. C. Cir. 1936), *cert. denied*, 298 U. S. 677 (1936); *United States* v. *Federal Surety Co.*, 72 F. 2d 964, 967 (4th Cir. 1934), *cert. denied*, 294 U. S. 711 (1935); *Federal Life Ins. Co.* v. *Barnett*, 71 Ind. App. 613, 125 N. E. 522 (1919); *The Eagle Ins. Co.* v. *The Lafayette Ins. Co.*, 9 Ind. 443 (1857). However, under a reinsurance

agreement, recovery may be had by the original insured (plaintiff) against the reinsurer if the original insured can show that the contract was made for his direct, or primary benefit, but such a contract must be strictly construed in favor of the person against whom such liability is asserted. *Sacks* v. *Ohio Nat'l Life Ins. Co.*, 148 F. 2d 128, 131 (7th Cir. 1945), *cert. denied*, 312 U. S. 706 (1941). *See also Kletstad* v. *American Cent. Ins. Co.*, 207 F. 2d 288 (7th Cir. 1953); *Couch* INSURANCE § 80, 67 (1968).

Plaintiff submits that the reinsurance agreements here provide for a direct suit against the reinsurers. Provision 14 of the General Reinsurance agreement provides that:

> [T]his agreement shall be deemed to comply with any law, whenever applicable which provides that the obligee or other beneficiary of the Bond shall have the right to maintain an action on such an agreement against the Reinsurer.

INDIANA ANN. STAT. § 39-4307 (Burns 1965 Repl.) (I. C. 27-1-13-6) provides in pertinent part:

> No stock or mutual insurance company transacting fidelity or surety business in this state shall expose itself to any loss on any one (1) fidelity or surety risk or hazard in an amount exceeding ten per cent (10%) of its capital, surplus and contingent reserves, [which Homeowners did in this case] unless it shall be protected in excess of that amount by: (a) Reinsurance in a company authorized to transact the fidelity or surety business in this state, *provided that such reinsurance is in such form as to enable the obligee or beneficiary to maintain an action thereon against the company reinsured jointly with such reinsurer* and, upon recovering judgment against such reinsured, to have recovery against such reinsurer for payment to the extent in which it may be liable under such reinsurance and in discharge thereof. [Court's emphasis]

Assuming as plaintiff contends that § 14 of the General Reinsurance Agreement controls over other somewhat conflicting provisions of the specific contracts, this provision merely pro-

vides that the contract will be deemed to *comply* with state law that provides for direct action against the reinsurer. Considering, then, that ordinarily an insured has no right of action against the reinsurer and the contract must be strictly construed in favor of the person against whom liability is asserted, it becomes necessary to analyze what would be *compliance* with IND. ANN. STAT. § 39-4307, *supra.*

The Indiana statute in question clearly does contemplate an action by the insured against the reinsurer, but it is equally clear from the language of that statute that such action is to be *jointly* with the company reinsured. This conclusion is supported not only by the language of the statute itself, but by the recognition in the statute that judgment must first be had by the insured against the reinsured, and then only may the insured recover against such reinsurer. This recognition reaffirms the original proposition that a contract of reinsurance is basically one of indemnity, and the reinsurer's liability only results from a loss incurred by the reinsured. Moreover, Provision No. 4 of the General Reinsurance Agreement provides that the "reinsurer shall become liable for its share . . . of all loss, interest, costs, and expenses for which the Reinsured *shall become liable in connection with the Bond. . . .*"

It is difficult to perceive how the reinsurer here can become liable on the Bond when there has been no judicial or other determination that the reinsured is liable. Neither the statute in question nor the provisions of the reinsurance agreement transform this agreement among the parties from one of indemnity to one of guaranty. The statute strictly construed merely modifies the indemnity relationship so as to allow the insured to have "recovery against such reinsurer for payment to the extent in which it may be liable" under the reinsurance agreement.

The statutory successor to the reinsured, Homeowners, for the purpose of the liquidation proceedings in Illinois is James

Baylor, Director of Insurance for the State of Illinois (hereinafter referred to as Liquidator). Generally, upon the insolvency of the reinsured, as is the case here, the proceeds of the reinsurance agreements are considered assets of the Liquidator for the use of general creditors. *United States* v. *Federal Surety Co., supra* at 967. Moreover, the Sangamon County, Illinois, Circuit Court in its order of April 8, 1971 declared that the "Liquidator has the right, title and interest in all funds receivable under treaties and agreements of reinsurance." It would appear, however, that IND. ANN. STAT. § 39-4307, *supra,* does, in effect, attempt to confer a preference upon the insured, by allowing the insured to have recovery against the reinsurer jointly with the reinsured to the extent the reinsurer may be liable under the reinsurance agreement. Plaintiff has not shown, however, that such a preference, if it exists, would not be respected by the Illinois liquidator. In fact, plaintiff directs this court's attention to the case of *People* v. *Chicago Lloyds,* 391 Ill. 492, 63 N. E. 2d 479 (1945), *rev'd on other grounds,* 329 U. S. 545 (1945), where the Illinois Supreme Court observed that if a statute of another state granted a preference to creditors residing in that state, such a statute would have been respected and deferred to by the Illinois liquidator. *Id.* at 486. The resolution of the issue concerning the extent of the rights of the plaintiff-insured, in these reinsurance proceeds, in the absence of the Liquidator, would obviously be prejudicial to the rights of the Liquidator, and therefore the remaining creditors of Homeowners. This court has concluded that under the reinsurance agreement and statute in question, a necessary prerequisite to an action against the defendant reinsurers is the joining of the statutory successor of the reinsured, viz., James Baylor, as Liquidator of Homeowners.

Having concluded that the Liquidator is an indispensable party to this action, the question becomes whether he can be joined as a defendant in light of the injunction of the Sangamon County, Illinois, Circuit Court which purported to restrain

all claimants, policyholders and creditors of Homeowners from asserting any claim against the Liquidator except in the Illinois liquidation proceedings.

This court would agree with plaintiff's general statement concerning the force of the Illinois injunction that:

> "An injunction against the prosecution of an action in another state acts upon the parties rather than the court, and, therefore, the court in which the enjoined action is pending has the power to proceed with the litigation despite the injunction. Nevertheless that court may take cognizance of the judicial processes of another state, and recognize an injunction issued by the court of another state as a matter of comity. If a court stays pending proceedings or abates an action by reason of a foreign antisuit injunction, it does so solely upon the ground of comity, and not because the Federal Constitution requires it so to act." (Citations omitted.) 74 A. L. R. 2d 814, *Foreign Antisuit Injunctions* at 830-831.

It would seem clear to this court, however, that, at least in the Seventh Circuit, a second court having acquired jurisdiction subsequent to the initiation of a statutory liquidation proceeding of another state, should defer to those proceedings on principles of comity. *See, e.g., Field* v. *Fidelity General Insurance Company*, 454 F. 2d 682 (7th Cir. 1971); *Thacher* v. *H. C. Baldwin Agency, Inc.*, 283 F. 2d 857 (7th Cir. 1960); *Janak* v. *Allstate Insurance Company*, 319 F. Supp. 215 (D. C. Wis. 1970).

In *Field* v. *Fidelity General Insurance Company, supra* at 685, the United States Court of Appeals for the Seventh Circuit stated:

> Courts have noted distinctions between a receivership and a statutory liquidation created by the state of incorporation, where, as here, title to rights of action vest in the liquidator under the supervision of a court. Particularly in the later situation the courts have emphasized the duty of a second court not to interfere with the possession of assets and the jurisdiction of the court in charge.

Moreover, in both *Thacher* v. *H. C. Baldwin Agency, Inc., surpa,* and *Janak* v. *Allstate Insurance Company, supra,* the courts have dismissed claims against the statutory liquidator, where such claims had been stayed by a state court except in the liquidation proceedings. Indeed, in *Thacher, supra,* the statutory liquidator, himself, had been the plaintiff and the claims asserted against him had been by way of set-offs and counterclaims, yet the court deferred those claims to the statutory liquidation proceeding. Furthermore, it would appear that the policy of Indiana is in accord with that expressed by the courts of the Seventh Circuit. In *O'Malley* v. *Hankins,* 207 Ind. 589, 194 N. E. 166 (1935) the Supreme Court of Indiana stated that:

> If the Courts of Indiana may equitably take possession of the assets of a company within Indiana for the benefit of the Indiana creditors, why cannot the Courts of Missouri or the Insurance Commissioner of that state, take possession of the assets of a company (which we assume to be the principal assets) located in the State of Missouri for the benefit of the Missouri policyholders and creditors? Such a procedure would manifestly work an injustice upon and injury to Indiana policyholders and creditors. *Id.* at 77.

There are also numerous sound policy considerations which militate in favor of this court's deferral to the liquidation proceeding. Requiring the statutory liquidator to travel to numerous states to appear and defend actions against Homeowners would obviously substantially increase the costs of administering the remaining assets, which in turn decreases the amount available for distribution among creditors. If this court were to order the Liquidator to forego his interest in the reinsurance proceeds, he would be exposed to the possibility of inconsistent judgments, ordering him to pay out the proceeds to those other than the insured. Finally, plaintiff has not shown that deferral of its claim to the liquidation proceeding would greatly prejudice it. *People* v. *Chicago Lloyds, supra,* cited by plaintiff would

indicate that the policy of the courts of Illinois would recognize plaintiff's preference, if it exists. In fact, it would appear that plaintiff would suffer little hardship if it were forced to adjudicate its claim in the Illinois proceeding. ILLINOIS REV. STAT. 1969 ch. 73, § 821 provides that one seeking to assert his claim in a statutory liquidation proceeding need only file:

> (1) A proof of claim [consisting] of a statement under oath, in writing, signed by the claimant, setting forth the claim, the consideration therefor, . . . and that the sum claimed is justly owing from the company to the claimant.

Such a procedure surely is not a great inconvenience to this plaintiff.

Accordingly, this court having concluded that James Baylor, Director of Insurance of the State of Illinois, as Liquidator of Homeowners Insurance Company, is an indispensable party to this action, and that he cannot be made a party hereto, defendant's motion to dismiss is hereby granted pursuant to *Fed. R. Civ. P.* 12(b)(7).

Pursuant to *Fed. R. Civ. P.* 41(b), this dismissal does not operate as an adjudication upon the merits, and plaintiff is free to pursue its claim in the proper forum, *i.e.*, the Illinois liquidation proceedings of Homeowners Insurance Company.

Entered this 6th day of October, 1972.

/s/ JESSE E. ESCHBACH,
United States District Judge.